Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
April Term, 1990

U. S. Sup. Ct. _____

ALAN BELCHER, *

Petitioner, *

vs. *

THE UNITED STATES OF AMERICA, *

Respondent. *

PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS
OF THE UNITED STATES OF AMERICA

COUNSEL FOR PETITIONER:

For Alan Belcher:

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QUESTIONS PRESENTED

Petitioner, Alan H. Belcher, petitions the Supreme Court of the United States of America for Writ of Certiorari to the Eleventh Circuit Court of Appeals of the United States for purpose of reviewing the following issues:

1. That the trial Court erred in not granting the motion to suppress as evidence all the files, records, documents and memoranda seized by a district attorney's subpoena and subsequently the subject of a federal grand jury subpoena. Further that failure of the Eleventh Circuit Court of Appeals to reverse is in direct conflict with other decisions of that Court or the district courts of appeal and of the United States of America.

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Petitioner prays that a writ of certiorari issue to review Opinion of the United States Court of Appeals for the Eleventh Circuit entered on February 15, 1990; Petition for Stay of Mandate denied on March 16, 1990, by the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The Order of the United States District Court, Middle District of Alabama, and the opinion of the Eleventh Circuit Court of Appeals is set forth in the Appendix, A-4 (District Court) and A-38 (Eleventh Circuit).

JURISDICTION

The jurisdiction of the United States District Court for the Middle District of Alabama was pursuant to an alleged violation of 21 U.S.C.S. 843(a)(3). This statute pertains to the acquisition and possession by the Petitioner of a quantity of a Schedule II controlled substance, Demerol, by misrepresentation, fraud, deception and subterfuge.

QUESTIONS PRESENTED

Petitioner, Alan H. Belcher, petitions the Supreme Court of the United States of America for Writ of Certiorari to the Eleventh Circuit Court of Appeals of the United States for the purpose of reviewing the following issues:

1. Did the trial court err in not granting the motion to suppress as evidence all the files, records, documents and memoranda seized by a District Attorney's subpoena and subsequently the subject of a federal grand jury subpoena? Further that failure of the Eleventh Circuit Court of Appeals to reverse is in direct conflict with other decisions of that Court or the district courts of appeal and of the United States of America.

STATUTES AND CONSTITUTIONAL PROVISIONS

21 U.S.C.S. 843(a)(3), it shall be unlawful for any person knowingly or intentionally (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

United States Constitution Amendment IV, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment XIV, Section 1, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Cause of Proceeding and Disposition in Court Below

This case commenced by the return of an eighteen-count indictment by the Grand Jury of the Middle District of Alabama against the Appellant for willfully and knowingly acquiring and obtaining possession of a quantity of Demerol, a Schedule II controlled substance, by misrepresentation, fraud, deception and subterfuge in violation of Title 21, *United States Code*, Section 843 (a)(3).

On September 6, 1988, the Appellant filed a Motion to Suppress as evidence all the files, records, documents, and memoranda or copies thereof in the possession of the United States Attorney, coming into the possession of the United States Attorney initially as a result of the District Attorney's Subpoena and subsequently as a result of the Federal Grand Jury Subpoena issued on or about May 31, 1988. hearing was held on September 8, 1988, on the Motion to Suppress, at which time both the Appellant and the Government were ordered by the Court to submit briefs regarding the issues raised.

On September 8, 1988, the Appellant's brief was filed with the Clerk of the Court, and the Appellee's brief was filed September 12, 1988.

On September 26, 1988, the trial Court issued an order denying the Appellant's Motion to Suppress.

On October 19, 1988, the Appellant appeared before Judge Myron H. Thompson and entered a conditional plea of guilty to Count I of the indictment. The remaining counts of the indictment were dismissed on the oral motion of the Assistant United States Attorney.

On March 3, 1989, after reviewing the pre-sentence report, the Appellant filed his objections to the pre-

sentence report, stating that there were mitigating circumstances which would warrant a departure from the prescribed Guideline range.

On March 6, 1989, at the time of sentencing, a hearing was held by the trial Court regarding the Appellant's objection to the report and the seeking by the Appellant of a downward departure of the Guideline range. After testimony was presented and arguments were heard, the motion for a downward departure was denied.

On March 6, 1989, the Appellant was ordered by the trial Court to pay a fine in the amount of $5,000.00, consisting of a fine in the amount of $1,326.70, and an additional fine in the amount of $3,673.30 to cover the costs of community confinement and supervision. It was further ordered that the Appellant be placed on probation for a period of two (2) years, subject to not possessing a firearm or other dangerous weapon and subject to participation in urinalysis testing and treatment for a narcotic addiction or dependency, if necessary. The Appellant was further sentenced to be confined in a community treatment center for two (2) months.

On March 7, 1989, the Appellant filed Notice of Appeal to the United States Court of Appeals, Eleventh Circuit, as well as a Motion for Release on Conditions Pending Appeal.

On March 9, 1989, the Court granted the Appellant's Motion for Release and continued him under the same conditions of bond set by the United States Magistrate on July 26, 1988.

STATEMENT OF THE FACTS

Motion to Suppress

The Appellant was a licensed veterinarian, who did business under the name of his veterinarian practice in Prattville, Alabama, as a sole proprietorship.

Prior to the time that the United States became involved in this case, an Alabama District Attorney issued a District Attorney's subpoena pursuant to the provisions of §12-17-184 (18), *Code of Alabama* (1975). This statute allows a State District Attorney to issue subpoenas returnable to him or herself when the State grand juries are not in session.

Pursuant to the subpoena, which was served by a City of Prattville narcotics officer on the Appellant at his sole proprietorship, Cliff Cleveland, Esq., attorney for the Appellant, made copies of all the records, complied with the subpoena, and turned the files over to the Prattville Police Department along with a document which he styled Compliance with Reservation of Objection setting forth the reasons he was objecting to complying to the subpoena but at the same time complying therewith.

At a later date this case was adopted by the United States Attorney's Office, at which time the United States Attorney issued a federal grand jury subpoena. The United States Attorney's subpoena was served on the secretary of Mr. Cleveland, who had previously tendered the copies of the documents and his objections to the Prattville Police Department. The attorney's secretary brought the original files to the United States Attorney's Office and a comparison was made between the originals and the copies which were already in the possession of the United States Attorney, and they were initialed at that time by the investigator.

Appellant contends that one file, the Mears file, was seized by the Prattville Police officer at the time the District Attorney's subpoena was originally served.

The Appellant, Alan Belcher, testified that he is a veterinarian, practicing under the name of Animal Care Center in Prattville, Alabama, as a sole proprietorship. Dr. Belcher testified that Ronald H. Davis and Alfred Wadsworth of the Prattville Police Department came

to his office to serve a District Attorney's subpoena. Dr. Belcher stated that he told the officers that he would have to contact his attorney, Cliff Cleveland, which he did, and Mr. Cleveland's associate came to his office. The associate looked at the subpoena and stated that they did not need to turn anything over to the officers at that time, as the records were not requested until the next day. Belcher further testified that as the officers were leaving his office, Officer Davis picked up the Mears record and stated, "Oh, here's one of the records I'm looking for; I'll just take it." Dr. Belcher stated that he did not object as he did not know what to do, as this occurred before his attorney arrived. He further stated that he knew that they were police officers.

During questioning by the Court, the Appellant stated that on Thursday afternoon, May 26, 1988, the two officers came into his office and saw the file lying on his desk and took the file from his office. He stated that he did not think about this file again and therefore when he signed the Reservation that he did not remember that the police officers had taken the file and did not remember the incident until the files were returned to his attorney and the Mears file was included in those returned.

During cross examination, Dr. Belcher reiterated that the officers came into his office with a District Attorney's subpoena. He stated that the officers observed the Mears file lying on his desk before he talked with his attorney. He stated that one of the officers stated that this was one of the files they were seeking. Dr. Belcher stated that he then telephoned his attorney who instructed him not to do anything until he got to the office. Dr. Belcher stated that when the attorney reached the office he spoke with the officers and told them that they would comply with the subpoena on the date and time indicated on the subpoena.

Dr. Belcher further stated that he did receive the District Attorney's subpoena, but that he had never seen the grand jury subpoena which was served on his attorney.

Officer Ronald H. Davis of the Prattville Police Department, Investigative Division, then testified for the government.

Officer Davis testified that he received telephone calls from pharmacists in the Prattville area regarding some prescriptions about which they had questions. He stated that he visited the pharmacists from whom he had received telephone calls and then proceeded to check with the other pharmacists in the Prattville area to determine if they had any prescriptions executed by Dr. Belcher. He stated that he located 18 prescriptions at different drug stores for Demerol filled out by Dr. Belcher and signed by him.

He stated that he first contacted Investigator Kathy Watts with the Alabama Bureau of Investigation Narcotic Unit and Ms. Watts in turn contacted the United States Attorney's office. He stated that he then brought the files he obtained from Dr. Belcher's office pursuant to the District Attorney's subpoena to the United States Attorney's Office, and a day later a federal grand jury subpoena was issued for the original records to compare against the copies he had obtained to make sure they had all the information.

He further testified that the original prescription slips were turned over to him voluntarily by the pharmacists and that on the basis of the prescription slips he obtained the District Attorney's subpoena.

Investigator Davis further stated that on May 26, 1988, he and Assistant Chief Alfred Wadsworth served the District Attorney's subpoena on Dr. Belcher at his office. He stated that while he was in the office he requested that Dr. Belcher turn the requested files over the him. He stated that Dr. Belcher asked them

to leave his office, which they did. He further stated that he saw the Mears file lying on Dr. Belcher's desk and asked if he could have this file. Investigator Davis stated that Dr. Belcher gave him the file but told him that he could not furnish the other records. He denied that he searched Dr. Belcher's office and asked only for the 18 records specified in the District Attorney's subpoena.

Upon cross examination Investigator Davis stated that Chief Wadsworth knew Dr. Belcher at the time of the initial contact but that he (Investigator Davis) did not. He stated that Chief Wadsworth introduced him to Dr. Belcher and that at the time Chief Wadsworth was in uniform. He stated that initially they did not serve the District Attorney's subpoena on Dr. Belcher, but advised him of his rights and talked with him. It was only after Dr. Belcher stated that he wanted to talk with his attorney did they serve the District Attorney's subpoena.

He stated that he received copies of all the files with the exception of the Mears file which he already had obtained from Dr. Belcher's desk and then delivered these records to the United States Attorney, together with the Reservation of Rights Form at which time a federal grand jury subpoena was issued in order to check the copies of the files against the originals.

Investigator Davis admitted under cross examination that the reason that he obtained a District Attorney's subpoena was that he did not feel that he had probable cause for a search warrant.

Investigator Davis further admitted that the copies of the files which he obtained pursuant to the District Attorney's subpoena were never returned to the District Attorney for the 19th Judicial Circuit of Alabama, but were delivered to the United States Attorney's office instead.

REASONS FOR GRANTING

The crux of this issue is succinctly addressed in the trial Court's order denying the Defendant's motion to suppress where, in footnote 16, the Court holds that the government's possession of the files pursuant to the Grand Jury subpoena was so inextricably linked to the District Attorney's subpoena that if tainted in the acquisition, the federal subpoena would not dissipate the taint.

It is axiomatic that the United States is prohibited by the Fourth and Fourteenth Amendments from unlawful search and seizure and therefore any evidence seized in violation of the Fourth Amendment must be excluded from trial, *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), and the Government is prohibited from using evidence illegally obtained by State officials, *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437 4 L. Ed. 2d 1669 (1960). The United States is not only prohibited from using illegally obtained evidence obtained by State officials at trial, but the amendment also prohibits any derivative evidence therefrom being used, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Moreover, a search warrant must be issued by a neutral and detached magistrate, *Cooledge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Except in certain carefully defined classes of cases, a search of private property without consent is unreasonable unless it has been authorized by a valid search warrant, *Mancusi v. Deforte*, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1968). A subpoena issued by the District Attorney does not qualify as a valid search warrant because it is not issued by a neutral and detached magistrate but by an officer engaged in the often competitive enterprise of ferreting out crime,

Mancusi v. Deforte, 392 U.S. at 371, 20 L. Ed. 2d at 1161. *Silverthorne Lumber Co.*, supra. "Questions based on illegally obtained evidence are a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong." In essence, all evidence obtained by the Grand Jury which was derived from the unlawful seizure is due to be suppressed as to use at the criminal trial of the victim of the illegal search and seizure. *United States v. Calandra*, 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974). *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L. Ed., S. Ct. 153 (1931).

Under the facts of this case, a police officer obtained a subpoena from a State District Attorney, admittedly because he did not have probable cause to obtain a search warrant in order to seize the Appellant's files. He then seized the Mears file without permission of Dr. Belcher. This act is clearly an illegal seizure. The violative conduct is further borne out by the fact that the District Attorney did not initiate the subpoena, nor did he receive the seized records, but merely complied with the request of officer Davis. The Autauga County District Attorney's office was not investigating this matter. The fact is that the evidence, once in the hands of officer Davis, was not even returned to the official who had requested it, but used by this same officer to obtain another subpoena from the federal Grand Jury. The eventual indictment emanated in part from the original illegal seizure of the Mears file in Dr. Belcher's office. Officer Davis obviously obtained evidence through the back door that he couldn't get through the front. By way of analogy, the following Florida cases are of note: *State V. Barriero*, 432 So. 2d 183 (Floa. App. 3 Dist. 1983); *Able Builders Sanitation Co. v. State*, Fla. App. 368 Sou. 2d 1340. Both of these cases stand for the proposition that the use of a District Attorney's subpoena in order to avoid

reciprocal discovery orders is an abuse of the discretionary power vested in the office by the statute providing for the use of these subpoenas. Officer Davis obtained a search warrant in order to avoid probable cause requirements which he could not meet. His actions bear out the wisdom contained in the *Cooledge*, supra, and *Mancusi*, supra, rulings which require a neutral and detached person to view all the circumstances before process is issued. The Court has relied upon *Krull v. Illinois*, _____U.S._____, 107 S. Ct. 1180 (1987) in reaching the conclusion that Officer Davis acted in good faith reliance on the subpoena when the facts as previously stated simply do not support this position. Officer Davis knew why he got a subpoena instead of a warrant.

Suppression is generally confined as a remedy to punish the government's violation of the Fourth Amendment to the United States Constitution, of such basic importance to the public in safeguarding it from unreasonable searches and seizures . . *United States v. Proctor and Gamble Company*, 190 F. Supp., 195 D. New Jersey (1959).

In its order denying Appellant's Motion to Suppress, the District Court indicates that suppression will not act as a deterrent to intrusions. The Appellant does not agree; suppression is the best remedy and the only remedy which will safeguard the public's constitutional right to privacy and prevent the abuse of process which occurred in this case.

The District Court contends that the files were not seized but given up, and that the Appellant's attorney could have objected and sought a pre-compliance judicial review. The Court relied on *Williams v. State*, 489 So. 2d 4, 8 (Ala. Cr. App. 1986). The Appellant's attorney did object and filed a reservation of rights with the Prattville Police Department. Further, Williams, supra, can be distinguished from the instant

case. In the present case, the subpoena was issued by the District Attorney's office pursuant to Section 12-17-184, *Code of Alabama* (1975) when there was no pending case or pending Grand Jury action. There has not been a holding in Alabama as to whether or not there exists a pre-enforcement review of the subpoena to test its validity and scope as had been done in *Pollard v. Roberts*, 283 F. Supp. 248, 255 (E.D. Ark), aff'd 393 U.S. 14, 89 S. Ct. 47 (1968)(per curian).

The subpoena in this case was not returnable to a Judge either directly or through a Grand Jury by which the Appellant could show cause why he did not comply therewith. The subpoena was returnable (but not returned) directly to the District Attorney, who has the power of civil arrest. The Appellant would face contempt first with no existing method of pre-compliance review. The action of the Appellant through his attorney was an objection and by its terms has preserved all his rights.

The evidence sought to be suppressed in this case should have been suppressed.

CONCLUSION

Petitioner earnestly insists that the United States Supreme Court upon review of this petition will grant the writ of certiorari and after consideration of the briefs and arguments will enter an order reversing the conviction of this Petitioner for these grounds:

A. That all the files, records, documents and memoranda seized by a District Attorney's subpoena was illegal and in violation of the Petitioner's Fourth and Fourteenth Amendment rights under the Constitution of the United States of America and therefore the opinion of the Eleventh Circuit Court of Appeals was in conflict with established case law.

Wherefore, Petitioner asks this Court upon consideration of this petition grant the writ of certiorari as to all Petitioners for the grounds stated.

Maurice S. Bell
Attorney for Petitioner
Alan Belcher

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing upon the Hon. Richard Thornburgh, Attorney General of the United States Department of Justice, Washington, D.C., Hon. James H. Wilson, District Attorney, United States District Court for the Middle District of Alabama, Federal Courthouse, Montgomery, Alabama, and upon the Hon. Kenneth W. Starr, Office of the Solicitor General, U.S. Department of Justice, 10th and Pennsylvania Ave. N.W., Washington, DC 20530, by placing a copy of the same in the United States Mail, postage prepaid, addressed as above, their last known addresses, this the 12th day of April, 1990.

Maurice S. Bell
Attorney for Petitioner
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Montgomery, AL 36101-0163
(205) 262-2719

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CASE NO. 88-164-N
ALAN H. BELCHER. Defendant.	)	

MOTION TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED

COMES NOW the Defendant and moves to suppress as evidence for trial all files, records, documents and memoranda or copies thereof in the possession of the United States Attorney, said documents having come into the possession of the United States Attorney as the result of a Federal Grand Jury Subpoena issued on or about the 31st day of May 1988, and as grounds therefore states separately and severally as follows:

1. On or about May 26, 1988, investigator R. W. Davis of the Prattville Police Department served a subpoena Duces Tecum upon the Defendant in this case. This subpoena was issued by the Autauga County District Attorney demanding that certain files consisting of all confidential records regarding the treatment of some eighteen animals (these animals being the same as those listed on the indictment in the instant case at bar), be produced for inspection by two o'clock (2:00) p.m. on May 27, 1988. The owners of the animals had not executed nor signed releases of information. Further, that while at the Defendant's place of business, Officer Davis illegally and without permission of the Defendant, seized the confidential file of one Greg Mears. Officer Davis turned this file over to the United States Attorney. The United States At-

torney, using the ilegally seized file as a basis, caused a United States Grand Jury subpoena to be issued upon the Defendant demanding that he turn over seventeen other files. These confidential records form the United States Government's basis for prosecution.

2. That said file was seized illegally.

3. That the contents of said file was the basis of the issuance of the Federal Grand Jury Subpoena from which the indictment in this case arose.

4. That said Federal Grand Jury Subpoena is illegal and without basis and any evidence obtained by the United States of America as a result of said subpoena being illegally obtained is due to be suppressed.

Defendant respectfully requests a pre-trial hearing.

Respectfully submitted,

William K. Abell
671 South Perry Street
Suite 300
Montgomery, AL 36104
(205) 832-4500

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing upon Hon. James Wilson, United States Attorney, and upon Hon. Patricia Conover, Assistant United States Attorney, by hand delivery this date.

Done this the _____ day of September, 1988.

_____

William K. Abell

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. 88-164-N
	)	
ALAN H. BELCHER.	)	

ORDER

In this criminal matter, defendant Alan H. Belcher is charged with 18 counts of acquiring and obtaining Demerol by misrepresentation, fraud, deception and subterfuge in violation of 21 U.S.C.A. § 843(a)(3). The court presently has before it Belcher's motion to suppress evidence illegally obtained. For the reasons below, the court concludes that this motion should be denied.

I.

On May 23, 1988, Ronald H. Davis, an investigator with the Prattville police department, received telephone calls from local pharmacists concerning questionable Demerol prescriptions issued by Belcher, a local veterinarian. Over the next few days, Davis contacted other local pharmacists to determine whether they too had received questionable prescriptions. In total, Davis found 18 Demerol prescriptions issued by Belcher that were suspicious. He asked for and was given these prescriptions by the various pharmacies that had filled the orders.

Davis believed that, in order to prove any wrongdoing by Belcher, the patient files for those animals who purportedly received the prescribed Demerol would be important. However, because he did not believe that he had probable cause, he felt that he

would be unable to obtain a search warrant. So instead, on May 26, 1988, Davis, with the 18 questionable prescriptions in hand, contacted the local district attorney's office. There he was able to obtain a "district attorney's subpoena" for the files in question.

Having obtained the subpoena, Davis and another officer then proceeded to Belcher's clinic. The officers explained to Belcher that they were at his office for the express purpose of serving him with the district attorney's subpoena. They also asked Belcher if he would be willing to speak with them. When he consented, Davis advised Belcher of his rights, and then began to ask him questions concerning his practice of prescribing Demerol. Sometime during this conversation, Davis noticed that a file for Greg Mears was lying on the corner of Belcher's desk. As this file was one of those listed in the subpoena, Davis asked Belcher whether he could have this file. Belcher consented, and Davis took the file.[1] After answering a few additional questions, Belcher decided to contact his attorney. On the advice of counsel, Belcher informed the officers that an attorney was on his way over to the clinic, and that, as the return date on the subpoena was not until the next day (May 27), he was not going to provide the records immediately. Without waiting for Belcher's attorney and having obtained the Mears file, the two officers then departed Belcher's office leaving the subpoena with Belcher.

Subsequently, Belcher provided his attorney with the other records requested in the subpoena. On May 30, three days after the return date appearing on the subpoena, copies of the files were delivered to the Prattville police department. Accompanying the rec-

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[1]At the hearing, Belcher contends that, while he could not remember if he told the officers that they could not have the file, he knows that he did not say that they could have it. As will be discussed in more detail, *infra*, at p. 21, the court concludes that Belcher's testimony is simply not credible with regards to this issue of consent.

ords was a form signed by Belcher entitled "Compliance with Reservation of Objection." In this form, Belcher stated that he was furnishing the subpoenaed documents, with the exception of the Mears file which he could not locate but would furnish if found. Furthermore, the "Reservation Form" stated that Belcher's actions in furnishing the files were done under objection, and with reservation of all rights accorded to him under (i) the Code of Alabama, (ii) the first, fourth, fifth, and fourteenth amendments to the United States Constitution, and (iii) judicial rulings of both the Alabama state courts and the federal courts.

Upon receipt of these files, Davis and another officer took the prescription slips, the Mears file, and the other records, and went to the offices of the United States Attorney for the Middle District of Alabama. There, they met with a federal prosecutor and presented their case against Belcher.

The following day, a federal grand jury was convened, and a federal subpoena was issued requesting the same records that had been the focus of the original district attorney's subpoena. Belcher fully complied with this federal subpoena and provided the original files as requested. In responding to this subpoena and in contrast to his manner in responding to the state subpoena, Belcher did not file any objections or reservations to the federal subpoena.

Upon receipt of the original files, the government compared those files with the copies obtained pursuant to the state subpoena. Satisfied that the copies were accurate and complete, the government then returned the original files to Belcher.

II.

At the hearing, Belcher contended that the records obtained pursuant to both the state and federal subpoenas must be suppressed. He premised this con-

tention on five theories. First, he argued that the Alabama statute which empowered the district attorney to issue a state subpoena was unconstitutional under the state constitution. Second, he argued that the Alabama statute was violative of the federal constitution because it provided an impermissible means for the government to seize documents without first receiving a judicial imprimatur of probable cause. Third, he claimed that the state subpoena violated the fourth and fifth amendment to the United States constitution. Fourth, he alleged that the Mears file was illegally seized. And finally, he contended that the files obtained pursuant to the federal grand jury were so tainted by the illegalities of the earlier state proceedings as to require suppression under the "fruits of the poisonous tree" theory.[2] The court will address these claims *in seriatim*.[3]

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[2]To the extent that Belcher also contended that the federal subpoena was in violation of his fourth and fifth amendment rights, the court notes that Belcher filed no motion pursuant to Fed. R. Crim. P. 17(c) to quash the subpoena and that Belcher voluntarily complied with the subpoena. As a result, he waived any privileges he may have had with regard to the act of production of the filed. *United States v. Coppola*, 788 F. 2d 303, 308 (5th Cir. 1986); *United States v. Penrod*, 609 F. 2d 1092, 1095 (4th Cir. 1979), cert. denied, 446 U.S. 917, 100 S.Ct. 1850 (1980); *United States v. Wolfson*, 299 F.Supp. 1246, 1250-51 (D.Del. 1969). *See also infra*, at p. 15-18.

[3]The government's brief suggests that this is not necessary because even if the state proceedings were tainted in some manner, the receipt of the documents under the federal grand jury's subpoena dissipates that taint under the "independent source" doctrine set forth in *Murray v. United States*, ——U.S.——, 108 S.Ct. 2529 (1988), and *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984). However, as will be discussed, *infra*, at p. 23-25, n.16, the facts of this case do not support the application of this doctrine.

The state subpoena was issued by an assistant district attorney pursuant to 1975 Ala. Code § 12-17-184(18), which states in relevant part:

> It is the duty of every district attorney and assistant district attorney, within the circuit, county or territory for which he is elected or appointed . . .
>
> (18) To, at any time the grand jury is not in session, issue subpoenas to persons to come before them . . . .

This subpoena power, Belcher contends, violates the Alabama Constitution's mandate of separation of powers as found in §§ 42 and 43 of Article III of the Constitution of Alabama of 1901.

The court's ability to address this contention is hindered by the fact that the scope of § 12-17-184(18) has heretodate not been addressed by any Alabama court and that neither the defendant nor the government has seen fit to brief this issue.[4] Nonetheless, under the facts of this case, the court concludes that

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[4]Defendant's citation to *Mancusi v. Deforte*, 392 U.S. 364, 88 S.CT. 2120 (1968), is simply inapposite. *Mancusi* concerned the issue of whether a subpoena issued by a district attorney could serve the same function as a judicially issued search warrant and thus justify an otherwise illegal search. The Supreme Court concluded that it could not:

> [T]he subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that "the inferences from the facts which lead to the complaint '. . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' . . ."

Id., at 371, 88 S.Ct. at 2125. What the Supreme Court did not address was whether the district attorney's authority to issue a subpoena duces tecum was itself invalid. *See id.*, at 371 n.8, 88 S. Ct. at 2125 n.8. S.Ct. at 2125 n. 8.

this challenged part of the statute poses no problems to Alabama constitutional law.

As an initial matter, the court notes that there is nothing inherently objectionable to granting a body in the executive branch the authority to issue subpoenas. On several occasions, the United States Supreme Court has upheld the statutorily based power of executive administrative agencies to issue subpoenas. This grant of authority has not been considered to be an unconstitutional encroachment on the judicial branch; instead, it has been viewed as granting powers coextensive with those held by a grand jury.

For example, in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494 (1946), the Supreme Court was confronted with a challenge to the statutory authority granting the Administrator of the Wage and Hours Division of the Department of Labor the power to issue subpoenas duces tecum in the course of investigations conducted pursuant to §11 of the Fair Labor Standards Act. In upholding this subpoena power, the Court analogized the Administrator's subpoena power to that of the grand jury:

> The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited . . . by . . . forecasts of the probable result of the investigation . . ." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979; *cf. Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed.

> 652. Nor is the judicial function either abused or abased, as has been suggested, by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide.

Id., at 216-17, 66 S.Ct. at 509 (footnotes omitted).

This is not to imply that a member of the executive branch may be granted unlimited subpoena power—"the subpoenas [must] be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. City of Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 1740 (1967). Equally important, an individual or entity receiving a subpoena issued by a member of the executive branch must have the opportunity to challenge the subpoena in a judicial forum prior to either its enforcement and the imposition of any penalties for failure to comply with the subpoena's directives. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415, 104 S.Ct. 769, 773 (1984); *Maness v. Myers*, 419 U.S. 449, 460-61, 95 S.Ct. 584, 592 (1975); *See v. City of Seattle*, 387 U.S. at 544-45, 87 S.Ct. at 1739-40. *See Brock v. Emerson Electric Co., Electronic & Space Division*, 834 F.2d 994, 997 (11th Cir. 1987).[5]

Thus, for many of the reasons stated by the three-judge court in *Pollard v. Roberts*, 283 F.Supp. 248, 255 (E.D. Ark.), *aff'd*, 393 U.S. 14, 89 S.Ct. 47 (1968) (per curiam), this court concludes that the challenged portion of § 12-17-184(18) can be construed so as to pass

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[5]The court also notes that the Attorney General of the United States is authorized to issue investigatory subpoenas pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970. This broad Congressional grant of authority to issue subpoenas in furtherance of criminal investigations, 21 U.S.C.A. §876(a), has been approved of by the courts. *United States v. Hossback*, 518 F.Supp. 759 (E.D. Pa. 1980); *United States v. Mountain States Telephone & Telegraph Co.*, 516 F. Supp. 225 (D.Wyo. 1981). *See United States v. Harrington*, 761 F. 2d 1485 (11th Cir. 1985).

constitutional muster. In *Pollard*, plaintiffs challenged an Arkansas statute which granted prosecuting attorneys the investigative and subpoena powers that previously had been exercised exclusively by grand juries. In upholding the facial constitutionality of the statute, the court noted that the Arkansas courts had construed the statute in question so as not to confer unlimited powers to the prosecuting attorneys. *Id.*, at 255. Moreover, the court noted that an individual who received a subpoena issued under the challenged statute could seek preenforcement review of the subpoena to test its validity and scope. *Id.*

This reasoning applies with equal force here. Although the Alabama courts have not yet addressed the district attorney's scope of subpoena authority under § 12-17-184(18), there is no reason to assume that it will be construed in an impermissible manner. And, while Belcher chose not to avail himself of the opportunity, he could have challenged the district attorney's subpoena prior to his compliance with its directives.[6] An Alabama "trial court has the inherent power to quash a subpoena duces tecum because it is unreasonable or oppressive." *Williams v. State*, 489 So.2d 4, 8 (Ala.Cr.App. 1986). There is no reason to suggest that an Alabama court would not consider constitutional challenges concerning the authority to issue a subpoena or the subpoena's scope in making its determination of whether a subpoena is "unreasonable or oppressive."

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[6]Belcher had sufficient time to challenge the subpoena had he so desired. He received the subpoena on May 26, 1988, and, although the return date was for the following day, his attorney did not deliver copies of the subpoenaed files to the Prattville police department until May 30.

As a result, the court concludes that § 12-17-184(18) survives Belcher's state constitutional attack.[7]

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[7]Even had the court determined that § 12-17-184(18) was unconstitutional on Alabama separation of powers grounds, that decision would not necessitate the result that the copies of the records obtained pursuant to the subpoena must be excluded. The supreme Court has construed the exclusionary rule to "operate[] as 'a judicially created remedy designed to safeguard Fourth Amendment rights' generally through the deterrent effect, rather than a personal constitutional right of the party aggrieved.' " *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620 (1974)). Because there was no ostensible deterrent effect to be found by excluding evidence obtained by an officer who relied in objective good faith on a search warrant that was issued by a neutral magistrate but was subsequently determined to be defective, the Supreme Court in *Leon* approved of what has come to be regarded as the "good faith" exception to the exclusionary rule. 468 U.S. at 920-21, 104 S.Ct. at 3420.

The Supreme Court's extension of the *Leon* "good faith" exception in *Illinois v. Krull*, _____ U.S._____, 107 S.Ct. 1160 (1987), is applicable to this matter. In *Krull*, the Supreme Court held that the exclusionary rule should not be applied to suppress evidence found by a police officer who had conducted a warrantless search pursuant to a state statute that was subsequently held to violate the fourth amendment. The Supreme Court explained:

> The approach used in *Leon* is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon*: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. 468 U.S., at 921, 104 S.Ct., at 3420.

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Similarly, the court concludes that Belcher's contention that § 12-17-184(18) is in violation of the federal constitution is without merit. At the hearing, Belcher argued that § 12-17-184(18) was facially unconstitutional because it had no "probable cause" prerequisite to the issuance of a district attorney's subpoena. Although grand juries need not meet a "probable cause" standard prior to issuing a subpoena, *United States v. Sahley*, 526 F.2d 913, 915- 16 (5th Cir. 1976) ("[m]ere suspicion that a crime is being committed is sufficient reason for a grand jury to issue a subpoena"), Belcher suggests that vesting similar authority in a district attorney is invalid because it creates too great a temptation for a prosecutor to obtain documents through a subpoena powers, thereby evading judicial review. Without addressing whether, in practice, there is actually a difference in a subpoena issued by a grand jury or by a prosecutor given the considerable leeway that some courts have been willing to cede prosecutors in their use of grand jury subpoenas issued without the authority of the grand jury, *compare United States v. Santucci*, 674 F.2d 624 (7th Cir. 1982) *with In re Melvin*, 546 F.2d 1 (1st Cir. 1976), Belcher's contention that a district attorney can evade judicial review by using a subpoena is incorrect. As just discussed in the prior section, judicial review does exist and is available to ensure that the government does not breach the protections afforded by the fourth amendment. See Brock v. Emerson Electric Co., 834

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Krull, ____ U.S. at ____, 107 S.Ct. at 1167 (footnote omitted).

Applying the Supreme Court Court's logic in *Leon* and *Krull* to this case, even if this court were to determine that § 12-17-184 (18) was in violation of the separation of powers doctrine embodied in the Alabama Constitution, the court would not exclude the evidence obtained on this ground as there is nothing in the record to suggest that Davis's reliance on the statute was anything but objectively reasonable. *See Krull*, ____ U.S. at ____, 107 S.Ct. at 1170.

F. 2d at 997 (11th Cir. 1987). Consequently the court concludes that § 12-17-184(18) survives Belcher's facial constitutional attack on this ground as well.[8]

3.

Belcher also claims that the district attorney's subpoena he received violated both his fourth and fifth amendment rights. In his brief, his fourth amendment claim surrounds the circumstances of the seizure of the Mears file. As this claim will be the subject of the next section of this order, *supra*, at p. 18-23, the court turns initially to Belcher's fifth amendment claims. A fifth amendment claim in this situation can rest on two different theories: (1) that the contents of the documents are privileged under the fifth amendment, or (2) that the act of producing the documents implicates fifth amendment concerns.[9] The Supreme

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[8]As with the court's earlier observations, *supra*, at p. 9-11, n.7, the court notes that *Illinois v. Krull*, ____ U.S. ____, 107 S.Ct. 1160 (1987), would preclude application of the exclusionary rule in this case even had the court concluded that § 12-17-184(18) was in violation of the fourth amendment to the United States Constitution.

[9]The government contends that the court need not reach this issue because the fifth amendment protection against self-incrimination does not extend to "required records" under *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948). In support of this contention, the government points to 21 U.S.C.A. § 827 as being applicable in this case.

The court cannot agree. The subpoenas were for Belcher's records concerning treatment of 18 animals. Section 827(a)(3) by its very terms applies to records of substances "manufactured, received, sold, delivered or otherwise disposed of." A fair reading of this statute would seem not to include patient files, but would instead be limited to a physician's records of his drug inventory. *See* 21 C.F.R. § 1304.04(g) (1988); *United States v. Norton*, 640 F.Supp. 1257, 1259 (D.Colo. 1986) (enjoining physician to maintain proper records of his drug inventory, including receipts and bills of lading, the quantity of all drugs received along with the identity of the manufacturer and the distributor, the identity of the person actually receiving the controlled substances along with a listing of those substances actually received, and dispensing slips). *See also United States v. Robinson*, 707 F. 2d 811, 814 (4th Cir. 1983). *Cf. United States v. Schiffman*, 572 F.2d 1137, 1142 (5th Cir. 1978).

Court's recent decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 1241-42 (1984), provides a proper starting point for addressing both of these theories.

In *Doe*, a grand jury subpoenaed a sole proprietor's business records. He moved to quash the subpoenas invoking fifth amendment privileges. The district court granted the motion except with respect to those records and documents which the proprietor was required by law to maintain. The Court of Appeals affirmed this ruling on two grounds: First, that business papers although created privately, are protected by the fifth amendment, and second, that the act of producing the subpoenaed documents would admit their existence and authenticity, and would thus implicate the fifth amendment. On review, the Supreme Court reversed the former holding, and affirmed the latter.

With regards to the issue of whether private business records are protected by the fifth amendment, the Supreme Court's inquiry was directed toward whether the records had been prepared voluntarily or involuntarily. *Id.*, at 610-612, 104 S.Ct. at 1241-42. Noting that in *Fisher v. United States*, 425 U.S. 391, 396, 96 S.Ct. 1569, 1573 (1976), it had held that the fifth amendment protects persons only from *compelled* self-incrimination, the Court in *Doe* concluded that "where the preparation of business records is voluntary, no compulsion is present." *Id.*, at 610, 104 S.Ct. at 1241 (footnote omitted). Finding that the subpoenaed individual had not contended that he prepared the documents involuntarily nor had he claimed that the subpoena would force him to restate, repeat, or affirm the truth of the documents' contents, the Court concluded that the contents were not privileged. *Id.*, at 611-12, 104 S.Ct. at 1242.

This conclusion is applicable here as well. Belcher describes the files at issue as "private personal treatment notes and records pertaining to his animal pa-

tients . . . ." Brief in Support of Motion to Suppress, at 6. Furthermore, he has not contended that the subpoena would in any way force him to affirm or restate the truth of the files' contents. Consequently, as to the contents of the files, the subpoena posed no fifth amendment violation.

With regards to the act of production, the *Doe* Court concluded that a government subpoena could compel an individual to perform an act that might have testimonial aspects and an incriminating effect. *Id.*, at 612, 104 S.Ct. at 1242. Relying again on its earlier holding in *Fisher*, the court noted that the resolution of whether the act of production is "testimonial" and "incriminating" for purposes of extending fifth amendment privileges is a factual matter that must be decided in each individual case according to the particular facts. *Doe*, at 613-14, 104 S.Ct. at 1242-43.[10]

Whether or not the production of copies of the documents pursuant to the district attorney's subpoena by Belcher's attorney was "testimonial" or "incriminating" is not an issue this court must address. Under the facts of this case, the court must conclude that Belcher's assertion of the fifth amendment privilege is being made at too late a date to afford him the protection he so desires.

"The sole concern of the Fifth Amendment . . . is governmental coercion." *Colorado v. Connelly*, ___ U.S. ___, 107 S.Ct. 515, 523 (1986). Insomuch as Belcher's

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[10]In *In Re Grand Jury No. 86-3 (Will Roberts Corp)*, 816 F. 2d 569, 573-74 & n.6 (11th Cir. 1987) (per curiam), *abrogated in part on other grounds, Braswell v. United States*, ___ U.S. ___, 108 S.Ct. 2284 (1988), the Eleventh Circuit noted that a district court must make findings when an individual assets a fifth amendment privilege against producing documents requested in a subpoena and cited *United States v. Melchor Moreno*, 536 F. 2d 1042, 1046-49 (5th Cir. 1976) as setting forth the procedures and standards by which a trial court acts in weighing claims of fifth amendment privileges. *See generally Doe v. United States*, ___ U.S. ___, 108 S.Ct. 23414, 2347-50 (1988); *Fisher v. United States*, 425 U.S. 391, 410-14, 96 S.Ct. 1569, 1581-82 (1976).

attorney provided the files to the Prattville police department, the issue this court must address is whether this act was "compelled" within the meaning of the Fifth Amendment. *See Minnesota v. Murphy*, 104 S.Ct. at 1142-43. Thus, the real question is, in this court's view, whether Belcher was required to produce the records over the objections he raised in his "Compliance with Reservation of Objections." The court concludes that he was not. Two facts play a significant role in the court's resolution of this question: first, that the "Compliance with Reservation of Objections" was delivered *simultaneously* with the production of the documents, and second, that Belcher could have judicially challenged the subpoena but chose not to.

In a non-custodial setting, a witness's answers "to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of privilege." *Minnesota v. Murphy*, 104 S.Ct. at 1142; *United States v. White*, 846 F.2d 678, 689-90 (11th Cir. 1988). A witness who testifies at a proceeding, rather than asserting a fifth amendment right, loses the privilege. *Murphy*, 104 S.Ct. at 427, 104 S.Ct. at 1142; *Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182 (1976). This principle has been applied to a variety of non-custodial settings, including testimony given to a grand jury, *Rogers v. United States*, 340 U.S. 367, 370-71, 71 S.Ct. 438, 440-41 (1951), and requests for documents pursuant to grand jury subpoenas. *United States v. Coppola*, 788 F.2d 303, 308 (5th Cir. 1986); United States v. Penrod, 609 F.f2d 1092, 1095 (4th Cir. 1979), *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850 (1980); *United States v. Wolfson*, 299 F. Supp. 1246, 1250-51 (D.Del. 1969).

There are two prerequisites to finding that government actions rose to the level of "compelling" an individual's testimony: first, the individual must have invoked the fifth amendment privilege, and second,

the individual must have shown that there was a realistic threat of self-incrimination. *Murphy*, 104 S.Ct. at 1142. As the Supreme Court explained:

> If he [a witness] asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him" in a subsequent criminal proceeding. *Maness v. Meyers*, 419 U.S. 449, 473, 95 S.Ct. 584, 598, 42 L.Ed.2d 574 (1975) (White, J., concurring in result) (emphasis in original). But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so.

Murphy, 104 S.Ct. at 1143.

Ordinarily, the invocation of a claim of privilege must be presented to a "tribunal" for evaluation at the time disclosures are initially being sought. *Garner*, 424 U.S. at 658-59 n.11, 96 S.Ct. at 1184-85 n.11. In this manner, the individual can receive a judicial ruling at that time on the validity of the claim, and has the opportunity to reconsider the act of noncompliance before being held in contempt. *U.S. ex rel. Berry v. Monahan*, 681 F.Supp. 490, 498-99 (N.D. Ill. 1988). *But cf. Garner v. United States*, 424 U.S. 664-65, 96 S.Ct. at 1187-88.

In this case, Belcher did not seek to assert affirmatively his claim before complying with the subpoena. Instead, he simply attempted to preserve the right not to produce the patient records while simultaneously producing the patient records. By producing the rec-

ords, however, he lost his fifth amendment privilege.[11] *Cf. United States v. White*, 846 F.2d at 690.

4.

Belcher also complains that, under the authority of the subpoena, Davis entered his office and illegally seized the Mears file.[12] He cites *Mancusi v. Deforte*, 392 U.S. 364, 88 S.Ct. 2120 (1968), for the proposition that a subpoena issued by a district attorney does not qualify as a valid search warrant. He argues that given the facts of this case, Davis, under the purported authority of the district attorney's subpoena, illegally entered his office and seized the Mears file.[13]

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[11]Additionally, the court notes that Belcher's "Compliance with Reservations" form also does not establish a basis for establishing a realistic or rational threat of self-incrimination. The burden of establishing entitlement to a fifth amendment privilege is, in the first instance, on the individual asserting the privilege, *see United State v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). While it may be that the act of producing the records might have been "testimonial" or "incriminating" in nature, *see, e.g., In Re Grand Jury Empanelled March 19, 1980*, 541 F.Supp. 1, 3 (D.N.J. 1980), aff'd, 680 F. 2d 327 (3rd Cir. 1982), *aff'd in relevant part, rev'd on other grounds sub nom. United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237 (1984), there is no *per se* rule that production of records is testimonial—"[t]hese questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." *Fisher v. United States*, 425 U.S. 391, 410, 96 S.Ct. 1569, 1581 (1976).

[12]The court assumes that this is the only fourth amendment claim that Belcher is making. While " '[t]he fourth amendment [does] provide[] protection against a . . . subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable,' " *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 770 (1973 (quoting *Hale v. Henkel*, 201 U.S. 43, 76, 26 S.Ct. 370, 379), the district attorney's subpoena in this case is well within permissible bounds.

[13]The government argues that under *Rawlings v. Kentucky*, 448 U.S. 98 (1980), Belcher lacks standing to raise a fourth amendment challenge to the records allegedly seized. The government contends that Belcher had no legitimate expectation of privacy because he was required to keep records of controlled substances used in his practice pursuant to

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Unfortunately for Belcher, the facts do not support his contentions. It is true that Davis entered his veterinarian office with the subpoena in hand. However, an entrance, such as the one at issue here, that is for the purpose of serving a subpoena is not the sort of governmental act which is forbidden by the fourth amendment. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413, 104 S.Ct. 769, 772 (1987). Entrance into a veterinarian's public office during business hours for

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21 U.S.C.A. § 827(b). Pursuant to the statutory enforcement scheme, these records can be inspected either pursuant to a subpoena issued under 21 U.S.C.A. § 876 or, pursuant to an administrative inspection warrant. 21 U.S.C.A. § 880(d).

This argument fails for two reasons. First, as the court previously noted, *supra*, at p. 12-13, n.9, 21 U.S.C.A. § 827(b) does not include patient treatment files. Second, even assuming it did include patient treatment files, these files could, except under special limited circumstances, only be the subject of an *on-site* inspection subsequent to the government's obtaining an administrative warrant. 21 U.S.C.A. §§ 880(c), 880(d). While the criteria for issuance of an administrative warrant is less stringent than the "probable cause" requirement for the constitutional issuance of a criminal search or arrest warrant, *United States v. Schiffman*, 572 F. 2d 1137, 1142 (5th Cir. 1978) the existence of the warrant requirement combined with the other statutory limitations placed on the exercise of the warrant, 21 U.S.C.A. § 880, clearly suggests a Congressional intention not to circumscribe the privacy interest entirely. *See United States v. Schiffman*, 572 F.2d at 1142 (concluding that the inspections pose only a limited invasion of the right of privacy, and noting that invasions of a greater magnitude could have been authorized). *Cf. Brock v. Emerson Electric Company*, 834 F.2d at 997 n.3 (Supreme Court's imposition of limitations on the government's authority to obtain documents with an administrative subpoena is based upon fourth amendment considerations); *United States v. New Orleans Public Service, Inc.*, 734 F.2d 226, 228 (5th Cir. 1984) (recognizing the differences that an on-site administrative inspection of documents poses to the privacy interests relative to an off-site inspection of documents obtained pursuant to a subpoena duces tecum).

the purpose of serving a subpoena simply does not implicate Belcher's limited expectation of privacy.[14] *See id.*, at 413-16, 104 S.Ct. at 772-74. *Compare United States v. New Orleans Public Service, Inc.*, 734 F.2d 226, 228-29 (5th Cir. 1984).

Furthermore, before proceeding with any discussion with Belcher, Davis read him his *Miranda* rights and had him sign a voluntary waiver form, (Gov't Exhibit 1). He and Belcher then discussed Belcher's prescriptions of Demerol. During this conversation, Davis noticed that the Mears file, one of the files requested in the subpoena, was lying on the corner of Belcher's desk. He asked Belcher if he could have the file, and Belcher consented. Only after some further period of discussion did Belcher decide to cease conversation, and consult with his attorney.

It cannot be questioned that a search or seizure conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35, 90 S.Ct. 1969 (1972). At the hearing, Belcher contended that he did not affirmatively authorize the officers to take the file. He claimed that while he could not recall whether he told the officers that they could *not* have the file, he knew that he did not say that they *could* have the file. In light of other parts of his testimony and the testimony of Davis, however, the court concludes that

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[14]It is important to note that the officers only entered the public areas of Belcher's offices—that is, the waiting area for the patients—to serve the subpoena. They conducted no search and seized no property while in this area waiting to speak with Belcher. Importantly, there is no evidence to suggest that they went into Belcher's private examination area or personal office until after Belcher invited them to do so.

Entrance into this public area did not violate Belcher's fourth amendment rights. Belcher had no subjective expectation of privacy in this area. *Cf. Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511 (1967) ("[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection").

this contention is simply not credible. At the hearing, the court noted that, in Belcher's "Compliance with Reservation of Objection" form submitted in response to the district attorney's subpoena, Belcher stated that he could not locate the Mears file but would continue to search for the file and would furnish it if found. When questioned by the court, Belcher simply could not reconcile this statement with his present claim that Davis had, without his consent but with his knowledge, taken the Mears file. Considering this inconsistency in concert with Davis's testimony that Belcher did voluntarily consent to his taking the file, the court concludes, on the basis of the totality of all the circumstances, that Belcher voluntarily consented to Davis's taking the Mears file. *See United States v. Mendenhall*, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879 (1980); *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047.

Moreover, the court notes that even if Belcher had not voluntarily consented to Davis's taking the file, the Mears file would still be exempt from the exclusionary rule under the doctrine of inevitability. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984); *United States v. Drosten*, 819 F.2d 1067 (11th Cir. 1987); *United States v. Hernandez-Cano*, 808 F.2d 779 (11th Cir.), *cert. denied*, ____ U.S.____, 107 S.Ct. 3194 (1987); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). Under this doctrine, evidence is admissible if:

> there . . . [is] a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution . . . demonstrate[s] that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct.

United States v. Hernandez-Cano 797 F.2d at 784 (quoting *United States v. Satterfield*, 743 F.2d at 846

(emphasis in original)). In this case, it is clear from Belcher's "Compliance with Reservation of Objections" form that, had Davis not taken the Mears file, Belcher would have provided a copy of it in compliance with the subpoena. This subpoena, which listed the file in question, had already been issued prior to Davis's having taken the file. Insomuch as this court has already concluded that obtaining the files pursuant to the district attorney's subpoena was lawful, all of the requirements necessary to apply the inevitability doctrine are satisfied. Thus, even if Belcher had not consented to Davis's initial taking of the Mears file, the court would be bound to deny Belcher's motion to suppress this file: to do so would be to put the government in a worse position than it would have been had the illegal conduct not occurred. *See Nix v. Williams*, 467 U.S. at 443, 104 S.Ct. at 2508; *United States v. Hernandez-Cano*, 808 F.2d at 784.

5.

Having found nothing in the state proceedings that would taint the admissibility of 18 files, the court concludes that the roots of the tree are healthy. Thus, Belcher's claim that the federal grand jury's acquisition of the files represents "fruits of the poisoned tree" need not be addressed.[15] With regards to any objections that Belcher might have had to providing the federal grand jury with the requested files, the court notes that it has already concluded that Belcher waived

[15]It should be noted that, in any event, suppression under a "fruits of the poisonous tree" theory is inapplicable in this matter. The copies of the files in the government's possession are the copies that were received pursuant to the state subpoena, not copies of the original files received pursuant to the federal subpoena.

those objections by fully complying with the federal grand jury request. *See supra* p. 5, n.2.[16]

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[16]Nevertheless, to complete the factual record, the court does add that, had the process of obtaining the files been tainted in the acquisition of the file copies pursuant to the district attorney's subpoena, then acquisition of the original files pursuant to the federal grand jury's subpoena would not be sufficient to dissipate that taint. The government's suggestion that the documents are admissible under the "independent source" doctrine set forth in *Murray v. United States*, _____ U.S. _____, 108 S.Ct. 2529 (1988), and *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984), is simply unavailing in this instance. Even if the government were in possession of copies of the files obtained pursuant to the federal subpoena rather than the state subpoena, the court notes that the decisions both to present the case to the federal government and to seek the federal grand jury subpoena were inextricably linked to the acquisition of the files pursuant to the state subpoena.

As the government concedes in its brief, *Murray and Segura* both hold that suppression of evidence initially discovered during an illegal search is not warranted when that evidence is later uncovered by valid means on the basis of information *wholly independent* of the initial illegal entry. *See Murray v. United States*, _____ U.S. at _____, 108 S.Ct. at 2535-36; *Segura v. United States*, 468 U.S. at 814-15, 104 S.Ct. at 3390.

In *Murray* the issue concerned the admissibility of evidence observed during a prior illegal entry but later seized pursuant to a valid search warrant issued after the illegal entry. When they applied for the search warrant, the agents made no mention of their earlier illegal entry nor did they rely on any observations made during that entry. *Id.*, at _____, 108 S.Ct. at 2532. In remanding the case to the district court for additional fact-finding, the Supreme Court noted that "[t]he ultimate question . . . is whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id.*, at _____, 108 S.Ct. at 2535.

Some sense of what the Court considered *not* to be a "genuinely independent source" was revealed in the very next sentence:

> This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id., at _____, 108 S.Ct. at 2535-36. In other words, if the actual illegal entry had any effect on the decision to seek the warrant or on the production of the warrant, then the "independent source" doctrine was not available. *Id.*, at _____ n.3, 108 S.Ct. at 2535-36 n.3.

continued on next page

III.

Accordingly, the court concludes, and it is so ORDERED, that defendant Belcher's motion to suppress evidence, filed September 6, 1988, be and it is hereby denied.

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Here, in spite of the fact that Davis was already in possession of the prescription slips, the decision to present the case to the federal government was made only *after* receipt of the copies of records pursuant to the district attorney's subpoena. When the case was presented to the federal government, both the slips *and* the copied files were revealed. When the subsequent decision was made to obtain the files pursuant to a grand jury subpoena, this decision was reached for the *express purpose* of checking the copies files against the originals.

The "independent source" exception is not available if, based upon all the facts and circumstances, there exists a causal nexus between the prior unconstitutional conduct and subsequent acts. *United States v. Kapperman*, 764 F.2d 786, 793 (11th Cir. 1985); *United States v. Ible*, 630 F.2d 389, 393-94 (5th Cir. 1980). Given the facts of this case, the court simply cannot conclude that, had he not received the copies files, Davis would still have decided to take the case to the federal government for prosecution—especially given Davis's own admission that he did not feel he had generated enough suspicion to support a finding of probable cause prior to receiving the contested files.

The court also notes that, if the receipt of the copies files pursuant to the state subpoena was invalid, the doctrine of inevitability is also unavailable in this instance. First, it must be recalled that the inevitability doctrine is in actuality an extrapolation from the independent source doctrine. *Murray v. United States*, _____ U.S. at _____, 108 S.Ct. at 2534. Given the conclusion above that the federal grand jury's acquisition was not based upon an "independent source" of information, the fact that the federal government might have retained the original records is irrelevant. Moreover, as discussed, *supra*, at p. 22, one requirement for admissibility under the inevitability doctrine is that the government be *actively* pursuing lawful means for obtaining the evidence *prior* to the illegal conduct. Although the Supreme Court's ruling in *Murray* might suggest a reconsideration of this prerequisite, the court is convinced that the policy rationale of preventing *post hoc* theoretical conjecture underlying this requirement, *see United States v. Brookins*, 614 F.2d 1037, 1048 (5th Cir. 1980), remains in force.

In this case, the federal government had absolutely no knowledge of the circumstances surrounding Belcher's Demerol prescriptions until after the copies of the records were provided to the Prattville police. Given this fact, application of the inevitability doctrine is not in order. *See United States v. Satterwhite*, 743 F.2d 827, 846-47.

DONE, this the 26th day of September, 1988.

UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITEL STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CASE NO. 88-164-N
ALAN H. BELCHER. Defendant.	)	

NOTICE OF CONDITIONAL PLEA AND RESERVATION OF RIGHT TO REVIEW OF THE ADVERSE DETERMINATION OF MOTION TO SUPPRESS

COMES NOW the defendant, Alan H. Belcher, by and through his attorney of record, and with the approval of the court and the consent of the government hereby enters a conditional plea of guilty pursuant to Rule 11(a)(2) of the Federal Rules of Civil Procedure to Count 1 of the indictment heretofore filed in this cause.

The defendant reserves the right, on appeal from the judgment, to review of the adverse ruling on the Motion to Suppress Evidence heretofore filed in this cause, and specifically the order entered by this court on September 26, 1988, denying the said motion

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the Honorable James Eldon Wilson, United States Attorney, Attention: Honorable Patricia Conover, Assistant United States Attorney by hand delivery of the same on this the _____ day of October, 1988.

_____
ATTORNEY FOR DEFENDANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7174

D. C. Docket No. CR 88-164-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALAN H. BELCHER,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

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Montgomery, AL 36101-0163
(February 15, 1990)

Before COX, Circuit Judge, HILL*, Senior Circuit Judge, and SMITH**, Senior Circuit Judge.

PER CURIAM:

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*See Rule 34-2(b), rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Alan H. Belcher, A veterinarian, was indicted on 18 counts of acquiring the prescription drug Demerol from registered pharmacists by misrepresentation and fraud, a violation of 21 U.S.C. §843(a)(3). Belcher entered a conditional plea of guilty to one count of misrepresenting information on a prescription for an animal patient in order to obtain the drug for self-use. The remaining counts were dismissed upon the government's oral motion. Belcher was sentenced to two months confinement in a community treatment center, two years probation, and a $5,000 fine.

Belcher contends that the trial court erred in refusing to suppress certain files and records obtained from him pursuant to a *subpoena duces tecum* issued by the Autauga County, Alabama, District Attorney. Belcher charges that these documents were obtained illegally and used to secure a federal subpoena and indictment against him. After careful consideration of the unique facts in this case, we affirm the decision not to suppress this evidence on the basis of Judge Myron H. Thompson's Memorandum Order entered on September 26, 1988.

Belcher also maintains that the district court erred by not departing downward from the applicable sentencing guideline range under the United States Sentencing Guidelines in light of his "significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" under section 5K2.13 of the Guidelines. Judge Thompson's refusal to depart downward from the applicable guidelines range is not subject to review by this court since "the Sentencing Reform Act prohibits a defendant from appealing a sentencing judge's refusal to make a downward departure from the guideline sentencing range. *See* 18 U.S.C. § 3742(a)(3) (West, 1985 and Supp. 1989) (allowing defendant to appeal only an *upward* departure

from the guideline range)." *United States v. Fossett*, 881 F. 2d 976, 979 (11th Cir. 1989). *See United States v. Davis*, 878 F. 2d 1299, 1301 (11th Cir. 1989).

Appellant's conviction is therefore AFFIRMED.